

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin, and Remy

From: Steven Benito Russo, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Pre-notice Discussion of Proposed Regulations 18722 and 18117:
Statement of Economic Interests Filing Obligations

Date: June 28, 2005

Executive Summary

Staff proposes two new regulations intended to impart greater clarity to certain filing obligations that arise under the Political Reform Act (the “Act”).¹ One of the proposed regulations addresses a number of rather specific issues that have arisen concerning precisely when an official is required to file statements of economic interests. (Proposed regulation 18722.) The other proposed regulation specifies that the failure of a person’s filing officer to fulfill any duty imposed under the Act will not relieve the person of any filing or disclosure obligation. (Proposed regulation 18117.) These proposed regulations largely just codify current staff advice concerning the issues involved.

The new regulations would:

- (1) Affirm for those officials who are required to file a statement of economic interests (“SEI”) within 30 days of assuming office that the date of assuming office is the date the official is either authorized to serve in the office, as by being sworn in, or begins performing the duties of the office, particularly the making of governmental decisions;
- (2) Specify for those officials who are subject to a confirmation process, and therefore required to file an SEI within a specified period of being appointed or nominated to a position, that the date of appointment is the date the official accepts the appointment, and the date of nomination is the date that the nomination is submitted to the confirming body;

¹ The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18109 through 18997 of title 2 of the California Code of Regulations. All regulatory references are to title 2, division 6 of the California Code of Regulations, unless otherwise indicated.

- (3) Codify advice that the date a person “leaves office,” for the purpose of Government Code section 87204, and therefore becomes obligated to file a leaving office SEI, is the date that the person is no longer authorized to perform the duties of the office, and stops performing those duties;
- (4) Specify that an official serving in a position as an alternate or as a designee incurs the same SEI filing obligations as the other members of the council, board, or commission on which the person serves; and
- (5) Affirm that the failure of a person’s filing officer or filing official to perform any duty imposed by the Act or to provide any notice will not affect any of the person’s filing or disclosure obligations.

Proposed Regulation 18722

A. Background

An express purpose of the Act, as set forth in section 81002, subdivision (c), is to ensure that the assets and income of public officials, which may be materially affected by their official actions, be disclosed, so that conflicts of interest may be avoided. In furtherance of this purpose, the Act establishes two categories of public officials who must periodically disclose their economic interests on SEI’s.

One category is composed of officials, including high-ranking elected officeholders, who are specifically listed in section 87200. Most of these officials are required by section 87202 to file an SEI within 30 days after assuming office. But those officials who are subject to confirmation by the Commission on Judicial Appointments or the State Senate must instead file an SEI within 10 days after being appointed or nominated. In addition, the officials listed in 87200 must thereafter file SEI’s annually as provided in section 87203, and file a final SEI within 30 days after leaving office, as provided in section 87204.

The other category is composed of officials who are not listed in section 87200, but are required to file SEI’s under the provisions of the conflict of interest code of the agency that employs them. Section 87300 requires every agency to adopt and promulgate a conflict of interest code. Section 87302 prescribes the requirements for every conflict of interest code, including the requirement that an employee of an agency who makes or participates in making governmental decisions that may have a reasonably foreseeable material effect on one or more of the employee’s economic interests, must be designated in the agency’s conflict of interest code as a person required to file SEI’s disclosing his or her economic interests. Mirroring section 87202, section 87302 goes on to state that every conflict of interest code must require that the agency’s designated employees not subject to confirmation by the State Senate file an SEI within 30 days of assuming office, but if subject to Senate confirmation must file within 30 days of

being appointed or nominated. Then mirroring sections 87203 and 87204, section 87302 states that every conflict of interest code must require that an agency's designated employees file SEI's annually thereafter and a final statement within 30 days after leaving office.

B. Date of Assuming Office

While specifying that an SEI must be filed within 30 days after assuming office would at first blush appear to be a rather specific directive, questions have arisen over the years as to the precise meaning of "assuming office." Does it mean the date that a person agrees to accept a position? The date the person is formally instated to a position by some official act? But what of the person who begins performing the duties of an office prior to formal instatement actually taking place?

In the absence of a clarifying regulation, such questions have been answered through staff advice. The most succinct statement of that advice appears in the *Aramburu* Advice Letter, No. I-96-206. In that letter, staff was asked to declare when an individual serving on the Delta Protection Commission (the "DPC") assumes office. The request for advice noted that a new commissioner may begin performing the duties of a commissioner well before an actual swearing in ceremony takes place. In response, staff advised:

"For the purposes of reporting, an individual appointed to the DPC assumes office when he or she is authorized to serve as a member of the DPC by being sworn in, making a governmental decision, or being otherwise authorized to serve as a DPC member, whichever is earlier."

The letter then declares in a footnote:

"We do not provide an exhaustive list here of the ways in which an individual may be 'authorized to serve' since this could depend on a factual determination. For example, if an appointee to the DPC appears before another agency and acts or purports to act on behalf of or as a representative of the DPC prior to being sworn in, the appointee may be deemed a public official who is authorized to serve and subject to the disclosure rules."

Under this advice, the event signaling that a person has assumed office, and therefore triggered a filing obligation is either: (1) the person has been formally invested with the authority of the position; or (2) the person has less formally been given license to perform the duties of the position. Whichever way the person may be said to have assumed office, the result is that the person has thus been placed in a position to make, participate in making, or attempt to use his or her official position to influence a governmental decision that may have a reasonably foreseeable material effect on one or more of the person's economic interests. With that, as this letter concludes, the disclosure provisions of the Act should therefore be triggered.

Interestingly, by taking the position that a person may be deemed to have assumed office prior to being sworn, not just by making or participating in making governmental decisions, but even by attempting to use his or her official position to influence a governmental decision, the *Aramburu* Advice Letter takes a very expansive view of what may trigger a filing obligation.² However, such an expansive view is consistent with section 87302, subdivision (d) as amplified by regulation 18730, subdivision (b)(5.5) which states, in part:

“Any person who resigns within 12 months of initial appointment, or within 30 days of the date of notice provided by the filing officer to file an assuming office statement, is not deemed to have assumed office or left office, provided he or she did not make or participate in the making of, or use his or her position to influence any decision....”

Subdivision (a)(1) of proposed regulation 18722 offers to codify the advice of the *Aramburu* Advice Letter, by providing that the date of assuming office is the date that a person either: is authorized to serve in the position, as by being sworn in; or begins to perform the duties of the position, as by making, participating in making, or attempting to influence a governmental decision; whichever occurs earlier.

C. Date of Appointment or Nomination

Just as questions have arisen about the precise meaning of “assuming office,” so have questions arisen about precisely when a person may be deemed to have been appointed or nominated, particularly in the case of persons who are appointed or nominated to a position subject to confirmation by the Commission on Judicial Appointments or the State Senate, and thus have their obligation to file an SEI triggered at that point. Does it occur when an appointing authority, such as the Governor, makes a public announcement that an appointment or nomination has been made, or is some different or more official action required? Here again, the Commission’s regulations have been silent regarding the meaning of these terms, but staff has been rendering advice on their meaning, assisted by outside authorities.

As for the meaning of the term “appointed,” staff has been assisted by section 18525 of the Government Code, which defines “Appointment,” as it relates to state civil service positions, as “the offer to and acceptance by a person of a position.” Borrowing this definition, staff has advised that a person is appointed when the person accepts an offer of appointment.

Concerning the meaning of the term “nominated,” staff was aided by sections 1320 -1323 of the Government Code, which specify the procedures for Senate confirmation of an appointment by the Governor. Under section 1320, a nomination is made when the Governor submits to the Senate a writing that designates the residence of a nominee and the office for

² Under section 87302 and regulation 18730, subdivision (b)(2) a person need not be designated to file SEI’s if the person only attempts to use his or her official position to influence a governmental decision, and neither makes nor participates in making a governmental decision.

which he or she is nominated. Borrowing this definition, staff has advised that a person is nominated when the appointing authority submits a nomination to the confirming body.

Subdivisions (a)(2) and (a)(3) of proposed regulation 18722 offer to codify the above definitions for “appointed” and “nominated.”

D. Date of Leaving Office

As for determining when a person “leaves office,” and thereby incurs an obligation to file an SEI within the following 30 days, the term “leaves office” has been particularly subject to dispute. Part of the dispute has arisen from the fact that officials often leave office more in stages than as a single sudden event. An official may, for example, stop performing any of the duties of the position, but still remain on the payroll as he or she uses up residual vacation time. As another example, an official’s official term of office may expire, but the official may continue to perform the duties of the office while completing certain unfinished business or filling in until a successor steps in.

Another part of the dispute has been sincere disagreement over what constitutes the best rule for declaring a person has left office. Those in favor of a universal rule applicable throughout the Act have contended that it should be the same rule that applies to the one-year “revolving door ban” imposed by section 87406. Under this section, specified state officials are prohibited, for a period of one year after leaving office, from representing any other person by appearing before or communicating with, for compensation, their former agency in an attempt to influence agency decisions that involve the making of general rules (such as regulations or legislation), or to influence certain proceedings involving a permit, license, contract, or transaction involving the sale or purchase of property or goods. For the purposes of this section, an official is deemed to have left office when he or she has permanently left state service and is no longer receiving compensation, including compensation for unused vacation time. (Regulation 18746.1, subdivision (b)(1); *Weil* Advice Letter, No. A-97-247; *Negrete* Advice Letter, No. A-99-177.)

Arguing from a practicality standpoint however, those arguing against a single universal rule for what constitutes leaving office have contended that a different rule solely applicable to SEI disclosure is preferable. They have taken the position that for SEI disclosure purposes a person should be deemed to have left office as soon as the person effectively stops performing the duties of an office and will no longer be performing those duties in the future, regardless of whether the person will continue to receive compensation for a period of time. In support of this position, they note that if the duty to file a leaving office SEI is triggered when the person stops performing duties then it will promote disclosure closer in time to when the person was involved in governmental decision making. They further note that since the purpose of SEI disclosure is to reveal potential conflicts of interest when the person was involved in decision making there is no basis for requiring disclosure at some later point. Finally, they note that a filing officer is in a better position to require an official to file a leaving office SEI if the statement is due at the end of an official’s last day on the job, rather than on some later date when the official may not be as accessible, and the urgings of agency staff may feel less important.

Siding with the latter view, staff has advised that for the purposes of determining when a leaving office statement must be filed, the date the official ceases performing his or her duties should be used, not necessarily the date the official goes off the agency's payroll. Therefore, an official who is still being paid for accrued vacation, sick leave, or other compensated time should file a leaving office statement within 30 days after the date he or she ceases performing duties for the agency. (*Carr Advice Letter*, No. I-93-387.) Subdivision (b) of proposed regulation 18722 codifies this definition of leaving office for SEI disclosure purposes.

E. Alternates and Designees

Another specific issue that has arisen concerning when a person has a duty to file an SEI is the issue of when a person serving an alternate or designee must file. By way of background on this issue, a number of councils, boards, and commissions include members who are appointed to serve as alternates, and therefore only participate as decision-making members of the board or commission when a particular need arises due the absence of one or more regular members. The California Coastal Commission is one such entity. Neither the Act nor Commission regulations expressly address the filing obligations of alternates.

Similarly, a number of councils, boards, and commissions have as members specified officeholders who may serve on the councils, boards, or commissions themselves, or designate other individuals to serve in their place. The State Treasurer, for example, is a prescribed member of a large number of state boards and commissions, but he is permitted by the rules of these entities to have a designee serve in his place. Here again, neither the Act nor Commission regulations expressly address the filing obligations of designees. So questions about when alternates and designees must file SEI's have been answered through staff advice.

A pivotal advice letter issued on this subject was the *Jenkins Advice Letter*, No. A-99-135. That letter specifically addressed the question of whether the members of a council who serve as alternates should be included as designated in the council's conflict of interest code as persons who must file SEI's. The conclusion reached in the letter was that all positions authorized to make or participate in the making of decisions should be included in a conflict of interest code, regardless of the frequency with which they are called upon to use their authority. As such, alternates would be required to file SEI's in the same manner as regular members.

Subdivision (c) of proposed regulation 18722 applies the principles of the *Jenkins* letter to the issue of SEI filing by alternates and designees who serve on a council, board, or commission, by expressly making them subject to the same filing requirements as regular members.

Proposed Regulation 18117

A. Background

In addition to imposing various duties on individuals and entities to disclose information to the public through the filing of documents such as SEI's and campaign statements and reports,

the Act and Commission regulations also impose various duties on the filing officers and filing officials whose job it is to collect those documents. Specifically, section 81010 provides:

- “With respect to reports and statements filed with him pursuant to this title, the filing officer shall:
- (a) Supply the necessary forms and manuals prescribed by the Commission;
 - (b) Determine whether required documents have been filed and, if so, whether they conform on their face with the requirements of this title;
 - (c) Notify promptly all persons and known committees who have failed to file a report or statement in the form and at the time required by this title;
 - (d) Report apparent violations of this title to the appropriate agencies; and
 - (e) Compile and maintain a current list of all reports and statements filed with this office.”

Commission regulations then amplify these duties with provisions set forth in regulation 18110 concerning the duties of filing officers with respect to campaign statements, and the provisions set forth in regulation 18115 concerning the duties of filing officers and filing officials with respect to SEI’s.

In addition to these enumerated duties, filing officers and filing officials often take on the responsibility to notify individuals of their SEI filing obligations.

B. Impact of Filing Officer Non-compliance on Filer Obligations

With filing officers having specified duties to perform under the Act, a question has arisen as to whether, and to what extent, the failure of a filing officer to perform any of these duties or to provide notice of a filing obligation impacts the filer’s responsibilities.

It should be noted that none of the filing or disclosure obligations imposed by the Act are expressly stated to be dependent upon any actions by the filing officer – not even the issuance of any notice of a duty to file. Nonetheless, individuals failing to comply with filing or disclosure obligations have often tried, particularly in the context of an enforcement action, to claim excuse in the alleged failure of a filing officer to fulfill some duty or provide some notice.

Proposed regulation 18117 is intended to specifically address such contentions by declaring that the failure of a filing officer or filing official to comply with any duty or provide any notice will not affect the duties of a filer.

Recommendation

Staff recommends that the Commission authorize staff to notice the proposed regulations for adoption.